

1 Mark H. Gunderson, Esq. (SBN: 2134)
2 Catherine A. Reichenberg, Esq. (SBN: 10362)
2 GUNDERSON LAW FIRM
3 5345 Kietzke Lane, Suite 200
3 Reno, Nevada 89511
4 Telephone: (775) 829-1222
4 Facsimile: (775) 829-1226

5 Deborah A. Klar, Esq. (SBN: CA 124750)
6 Tuneen E. Chisolm, Esq. (SBN: CA 211741)
6 LINER YANKELEVITZ
7 SUNSHINE & REGENSTREIF LLP
7 1100 Glendon Avenue, 14th Floor
8 Los Angeles, California 90024-3503
8 Telephone: (310) 500-3500
9 Facsimile: (310) 500-3501
9 ADMITTED PRO HAC VICE

10 Attorneys for Plaintiffs
11 DENNIS MONTGOMERY and the MONTGOMERY
11 FAMILY TRUST

12 **UNITED STATES DISTRICT COURT**

13 **DISTRICT OF NEVADA**

15 DENNIS MONTGOMERY and the) Case No. 3:06-CV-00056-PMP-VPC
16 MONTGOMERY FAMILY TRUST,) BASE FILE
17 Plaintiffs,) (Consolidated with Case No. 3:06-CV-
18 vs.) 00145-PMP-VPC)
19 ETREPPID TECHNOLOGIES, LLC; WARREN) **OPPOSITION OF THE MONTGOMERY**
20 TREPP; and the UNITED STATES) **PARTIES TO MOTION OF THE**
20 DEPARTMENT OF DEFENSE,) **UNITED STATES TO ENFORCE U.S.**
21 Defendants.) **PROTECTIVE ORDER RE:**
22) **ATTORNEY'S FILES**
23 AND RELATED CASES.)
24
25
26
27
28

1 **I. INTRODUCTION.**

2 In its so called “Motion For Enforcement of U.S. Protective Order with Respect to Attorney
 3 Files,” the United States (hereinafter “Government”) acknowledges that it has previously requested
 4 that this Court impose the same relief it seeks pursuant to this motion. But, as the Government
 5 concedes, this Court, in its September 4, 2007 order granting Michael Flynn’s (“Flynn”) motion to
 6 withdraw, declined to impose the review procedures that the Government sought. The
 7 Government’s renewed attempt to have the Court impose procedures to facilitate its review and
 8 “storage” of the files Flynn maintained in connection with his representation of Dennis
 9 Montgomery, Brenda Montgomery and the Montgomery Family Trust (“the Montgomery
 10 Parties”)--files which the Government acknowledges contain information that is subject to the
 11 attorney-client privilege--is an improper motion for reconsideration of this Court’s September 4,
 12 2007 order. But, nowhere in its moving papers does the Government demonstrate that the criteria
 13 for granting a motion for reconsideration are satisfied--*e.g.*, new facts, clear error by the Court, or a
 14 change in controlling law. For this reason alone, the Government’s so-called Motion for
 15 Enforcement of U.S. Protective Order properly should be denied.

16 The Government’s motion also should be denied because it is not entitled to the relief
 17 which it seeks under the U.S. Protective Order. The U.S. Protective Order--which the Government
 18 erroneously claims it is “enforcing” by its motion--does not give the Government the right to
 19 review any attorney’s files. The U.S. Protective Order only gives the Government the right to
 20 review documents which are the subject of discovery in the pending actions.

21 Finally, the Government’s motion should be denied because, as the Government
 22 acknowledges, much of the information it seeks to review is protected by the attorney-client
 23 privilege. However, the U.S. Protective Order does not afford the Government the right to review
 24 information protected by the attorney-client privilege. Furthermore, the Government presents no
 25 authority that a Government agent is entitled to review documents that are protected by the
 26 attorney-client privilege in the circumstance presented in its motion.

27 Notwithstanding that the Government’s motion should be denied for the reasons stated
 28 above, the Montgomery Parties believe that the competing concerns of the Government and the

1 Montgomery Parties can be accommodated. According to Flynn, the documents in his files that
 2 fall within the parameters of paragraphs 2 and 3 of the U S. Protective Order are e-mails and a few
 3 "original" documents. Given those limited categories, it would appear that the interests of the
 4 Government could be reconciled by means of an Order of this Court directing Flynn and all of the
 5 attorneys he employed to work with him on the Montgomery Party matters to (i) deliver to the
 6 Court all of the e-mails they sent and received in connection with Flynn's representation of the
 7 Montgomery Parties and (ii) certify to the Court that they have destroyed all electronic and paper
 8 copies of the subject e-mails. Such an order would accommodate the Government's concern,
 9 because once the emails were deposited with the Court, there would be no risk that information
 10 protected by the state secrets privilege contained therein would be disseminated to any third party.
 11 The order would accommodate the concerns of the Montgomery Parties because no review of
 12 attorney-client information would be required.

13 Because there are only one or two "original" documents in the Flynn files that may include
 14 privileged state secret information, the Order could further provide that those few "original"
 15 documents would be reviewed and redacted by the Court, as were certain pleadings and transcripts.
 16 The Montgomery Parties recognize that such a review imposes a burden on the Court. However, it
 17 appears to be the least intrusive method to accommodate the competing concerns of the
 18 Government and the Montgomery Parties.

19 **II. PERTINENT PROCEDURAL BACKGROUND.**

20 In connection with Flynn's motion to withdraw, the Government asked the Court to impose
 21 as conditions of the withdrawal that:

22 (1) all counsel certify that they have complied with their obligations to protect information
 23 subject to the military and state secrets privilege as upheld by the Court in the instant actions;

24 (2) all counsel certify that they have not transmitted any information covered by the military
 25 and states secrets privileged to new counsel for Montgomery or to any other person;

26 (3) all counsel have either produced to the United States or, after consultation with United
 27 States Department of Justice Security and Emergency Planning Staff (SEPS), certified that they

- 1 have properly destroyed all information, either in hard copy or electronic format, in their
- 2 possession that is protected by the military and state secrets privilege; and

3 (4) the United States either has confirmed that all counsel for Montgomery have produced
4 such documents to the United States, or determined that counsel for Montgomery's certification
5 that information protected by the military and state secrets privilege in any documents in either
6 hard or electronic format in counsel for Montgomery's possession has been destroyed is
7 sufficiently detailed. *See Motion For Enforcement Of U.S. Protective Order With Respect To*
8 *Attorney Files (“Motion”), p. 2.*

9 The Court declined to impose the conditions that the Government sought requiring only that
10 Flynn and his associate, Carla DiMare (“DiMare”), certify that they have not transferred any
11 information covered by the military and state secrets privilege to new counsel for Dennis
12 Montgomery or to any other person. The Government’s request was not denied without prejudice.
13 See September 4, 2007 Order granting Flynn Motion to Withdraw.

14 By its so-called Motion for Enforcement of U.S. Protective Order, the Government once
15 again seeks for this Court to impose conditions to protect information that is purportedly subject to
16 the state or military secrets privilege. Specifically, the Government wants this Court to establish
17 various categories of information and then:

18 • have U.S. Government employee or employees with the appropriate security
19 clearances and authorizations review the Montgomery client files in his former
20 counsel's possession to identify and segregate all documents that fall within three
21 of the specified categories and redact purportedly protected information from such
22 documents;¹

23 • return redacted copies of the documents to the Montgomery client files;

24 • store unredacted originals and one copy of the redacted documents with the U.S.

25 Department of Justice Security Office until 90 days after the date on which a

²⁷ ¹ According to the Government, in theory, these employees would not disclose the content of attorney-client privileged documents either to Government counsel or to any other Government officials working on or otherwise connected with such cases. *See Motion*, p. 4.
²⁸

1 resolution on the fees issue is reached, or a final order is issued, and any appeal
 2 therefrom relating to the transfer of files from former counsel to current counsel has
 3 been exhausted; and

4 • upon completion of the 90-day period, destroy the unredacted originals and copies
 5 unless either: (a) before resolution of the transfer of files issue, both current and
 6 former counsel notify the U.S. Government in writing that it is not necessary to
 7 retain the originals and copies referred to in this paragraph; or (b) after resolution of
 8 the transfer of files issue, current or former counsel obtain a court order postponing
 9 the destruction of the originals and copies.

10 Motion, pp. 3-5.

11 **III. THE GOVERNMENT'S IMPROPER MOTION FOR RECONSIDERATION**
 12 **SHOULD BE DENIED**

13 As stated, the Government acknowledges that the Court denied its request for specific
 14 procedures "for reviewing and securing any military and state secrets privileged information
 15 contained in" the files of the Montgomery Parties' former counsel. Motion, p. 2 ("The Court,
 16 however, declined to impose, as conditions of withdrawal, the government's proposals for
 17 reviewing and securing any military and state secrets privileged information contained in Flynn and
 18 DiMare's files."). *See also* 11/15/07 Hearing Tr. at 72:4-11 appended as Exhibit "B" to the
 19 Declaration of Deborah A. Klar ("Klar Decl.") (Government acknowledges that in connection with
 20 the Montgomery Parties' counsel's motion to withdraw, the Government sought "to review the
 21 material or have it secured, that was in -- the documents that were in the possession of Mr. Flynn
 22 because -- and Mr. Logar for that matter -- because Mr. Flynn had indicated that his files were
 23 replete with information that is covered by the U.S. Protective Order.") These acknowledgements
 24 are fatal because they can only be construed as admissions by the Government that, by its pending
 25 Motion for Enforcement of U.S. Protective Order, the Government actually seeks reconsideration
 26 of the relief which it sought, but which the Court denied, pursuant to its September 4, 2007 order

27 A motion for reconsideration is appropriate only if the district court (1) is presented with
 28 newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,

1 or (3) if there is an intervening change in controlling law. *School Dist. No 1J, Multnomah Cty. v.*
 2 *Acands, Inc* , 5 F 3d 1255, 1263 (9th Cir. 1993). Here, the Government has made no showing of
 3 either newly discovered evidence, clear error by this Court, a manifestly unjust decision, or an
 4 intervening change in controlling law. Accordingly, the Government's improper motion for
 5 reconsideration, captioned "Motion for Enforcement of the U.S. Protective Order With Respect to
 6 Attorney Files" properly must be denied.

7 **IV. THE GOVERNMENT IS NOT ENTITLED TO REVIEW OR STORE**
 8 **PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS BETWEEN**
 9 **THE MONTGOMERY PARTIES AND THEIR FORMER COUNSEL.**

10 The attorney-client privilege is regarded as the most sacred of all legally recognized
 11 privileges. *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997). It serves the purpose of
 12 encouraging full and frank communication between attorneys and their clients and, in turn,
 13 promotes public interest in the observance of law and administration of justice. *Upjohn Co. v.*
 14 *United States*, 449 U.S. 383, 389 (1981). As the Supreme Court noted, "the privilege recognizes
 15 that sound legal advice or advocacy serves public ends and that such advice or advocacy depends
 16 upon the lawyer's being fully informed by the client." *Id.* The client is the sole holder of the
 17 attorney-client privilege and, as such, has the exclusive authority to waive it *United States v.*
 18 *Layton*, 855 F.2d 1388, 1406 (9th Cir. 1988)

19 The Government concedes that much of the information that is the subject of the
 20 Government's Motion is subject to the attorney-client privilege. Motion, p. 4 That fact is
 21 confirmed by Flynn. *See, e.g.*, 8/17/07 Hearing Tr. at 6:25-7:5 appended as Exhibit "A" to Klar
 22 Decl. Relying exclusively on on Justice O'Connor's dissenting opinion in *Swidler & Berlin v.*
 23 *United States*, 524 U.S. 399 (1998), the Government takes the position that the attorney-client
 24 privilege may be abrogated when there is a compelling law enforcement need for the information or
 25 if the information otherwise relates to a pivotal issue in the litigation. Motion , p. 8. However, the
 26 Government's reliance on Justice O'Connors dissenting opinion in *Swidler* for this proposition is
 27 misplaced.

1 *Swidler* addresses the issue whether the attorney-client privilege survives the death of the
 2 client. Since Mr. Montgomery is very much alive, whether and under what circumstances the
 3 attorney-client privilege will be upheld after the privilege holder's death is irrelevant. *Swidler* is
 4 also inapposite because the privileged information sought by the Government related to a criminal
 5 investigation. *Id.* at 401. Here, the Government is not seeking to abrogate the attorney-client
 6 privilege to secure "information of substantial importance to a particular criminal case" -- the issue
 7 that concerned Justice O'Connor in her dissent. *Id.* at 408-409.

8 Further, the actual holding in *Swidler* does not support the Government's assertion that the
 9 privilege can be abrogated where the information sought concerns a pivotal litigation issue or a
 10 compelling law enforcement need. The majority rejected the application of a balancing test
 11 weighing the importance of the information against client interests. *Id.* at 409 citing *Upjohn Co. v*
 12 *United States*, 449 U.S. 383, 393 (1981) and *Jaffe v Redmond*, 518 U.S. 1, 17-18 (1996).

13 Finally, Justice O'Connor indicated in her dissenting opinion that she was advocating an
 14 exception to the attorney-client privilege that did not presently exist. As Justice O'Connor stated:

15 In my view, a criminal defendant's right to exculpatory evidence or a compelling law
 16 enforcement need for information may, where the testimony is not available from other
 17 sources, override a client's posthumous interest in confidentiality" and that "an exception
 18 may likewise be warranted in the face of a compelling law enforcement need for the
 19 information.

20 *Id.* at 411, 413. In short, the Government's assertion that its interest in reviewing the Flynn's files,
 21 justifies abrogation of the attorney-client privilege entirely lacks support.

22 The Government further argues that a reasonable consequence of the withdrawal of Flynn
 23 and DiMare, as counsel for the Montgomery Parties is that an unidentified third party, acting on
 24 behalf of the Government, should be entitled to review all of the files which Flynn has maintained
 25 in connection with his representation of the Montgomery Parties since in or about January 2006.
 26 This would include files maintained in connection with matters unrelated to the pending litigation
 27 that also contain information that is absolutely privileged pursuant to the attorney-client privilege.
 28 That result is draconian and should not receive this Court's imprimatur.

1 “But for” the termination of the attorney-client relationship between Flynn and the
 2 Montgomery Parties, the Government would not be seeking an order to inspect Flynn’s files.
 3 Moreover, they cite no precedent to support the novel assertion that given the termination of the
 4 attorney-client relationship and before successor counsel has an opportunity to inspect the Flynn
 5 files, the Government must be permitted to inspect those files. That is not a reasonable
 6 consequence of the termination of an attorney-client relationship.

7 In sum, the Government fails to demonstrate any basis to abrogate the attorney client
 8 privilege held by the Montgomery Parties in this circumstance. Accordingly, its motion should be
 9 denied.

10 **V. THE U.S. PROTECTIVE ORDER DOES NOT IN FACT PROVIDE FOR**
 11 **THE PROCEDURES NOW SOUGHT BY THE GOVERNMENT.**

12 Although the Government captions its motion “Notice of Motion and Motion to Enforce
 13 Protective Order with Respect to Attorney Files”, there is no provision under the U.S. Protective
 14 Order and related protocols pursuant to which the Government is entitled to review Flynn’s files
 15 Certainly, none is identified in the Government’s moving papers.

16 Under the U.S. Protective Order, there is no provision that would entitle the Government to
 17 ever review Flynn’s files, and certainly not privileged documents contained in those files, even if
 18 the documents contained information protected by the states secret privilege. The U.S. Protective
 19 Order only allows the Government to review documents that a party intends to produce. The Flynn
 20 files do not fall in the category of documents to be produced. Turning over files to successor
 21 counsel does not constitute the production of documents. Accordingly, the Court would not be
 22 enforcing the U.S. Protective Order if it entitled the Government to review Flynn’s files

23 A further problem with the Government’s motion to enforce is that current counsel for the
 24 Montgomery Parties would be precluded from reviewing the Flynn files before they were reviewed
 25 by the Government. However, during a recent meet and confer, counsel for the Montgomery
 26 Parties asked how the Government expected the parties to comply with the U.S. Protective Order.
 27 Specifically, counsel for the Montgomery Parties asked whether the Government expected counsel
 28 for a party to review documents to be produced for purposes of evaluating whether a document

1 falls within the parameters of the U.S. Protective Order or whether the client was expected to make
 2 that determination. In response, counsel for the Government stated it expected counsel for the
 3 producing party would review documents for that purpose. Klar Decl. ¶¶ 5-6.

4 Consistent with the Government's recent assertions, if Flynn were a party who was required
 5 to respond to discovery, according to the Government, under the U.S. Protective Order, counsel for
 6 that party would be required to review the documents to be produced to see if they fall within the
 7 parameters of the U.S. Protective Order. See Klar Decl. *Id.* But, with respect to the Flynn files, the
 8 Government, without explanation, takes the anomalous position that successor counsel may not
 9 review the documents for that purpose.

10 For the reasons stated above, it is evident that the motion filed by the Government does not
 11 seek to enforce any provision of the U.S. Protective Order. Accordingly, no relief properly can be
 12 granted by this Court pursuant to that Order.

13 **VI. THE COMPETING OBJECTIVES OF THE GOVERNMENT AND THE**
 14 **MONTGOMERY PARTIES CAN BE ACCOMMODATED BY FAR SIMPLER**
 15 **AND LESS INTRUSIVE MEANS THAN THE WHOLESALE REVIEW OF**
 16 **THE FLYNN FILES SOUGHT BY THE GOVERNMENT IN ITS MOTION.**

17 At the hearing on his motion to withdraw, Flynn described two categories of documents that
 18 contain information that may fall within the parameters of paragraphs 2 and 3 of the U.S. Protective
 19 Order. First, "there are probably thousands of e-mails, many of which contain references to matters
 20 that ended up in memos, declarations and transcripts, that relate, in one way or another, to what the
 21 government -- to what the Court has approved to be redacted under your April 2nd order." 8/17/07
 22 Hearing Tr. at 6:25-7:5 appended as Exhibit "A" to Klar Decl. Second, Flynn reported to the
 23 Court that there were a few "original" documents in his files that might contain such information
 24 8/17/07 Hearing Tr. at 22:10-16 (Regarding the category of "original documents" that "is probably
 25 limited to, and this is off the top of my head so I can't be bound by this, but it's probably limited
 26 to one document, or perhaps two, one of which is extremely sensitive for national security
 27 purposes, containing names and phone numbers . . .")

28

1 The Government claims it simply needs to ensure that the information identified by Flynn is
 2 not publicly disclosed. As the Government's counsel explained at the August 17, 2007 hearing:

3 [T]he focus is entirely from our perspective entirely from our perspective on
 4 sanitizing the material, both written and electronic, that is within the four walls of
 5 Mr. Flynn's office and Ms. DiMare's office, so that we can prevent any future
 6 disclosures of privileged material. And that is our only interest, and has
 7 throughout this litigation, been our only interest, rather than in taking sides
 8 between one party or another.

9 8/17/07 Hearing Tr. at 29:7-13. At the same hearing, the Court acknowledged the legitimate
 10 competing concerns of the Montgomery Parties *Id.* at 29:21-30:1.

11 It is respectfully submitted that given the limited category of documents identified by Flynn
 12 as containing information that would fall within the parameters or paragraphs 2 and 3 of the U.S.
 13 Protective Order, the competing concerns of the Government and the Montgomery Parties can be
 14 accommodated by the following procedures which are far simpler and less intrusive means than the
 15 wholesale review of the Flynn files and other relief sought by the Government's pending motion:

16 **E-mails.** That the Court enter an Order directing that Flynn and all of the attorneys he
 17 employed who performed worked on behalf of the Montgomery Parties (i) turn over to the Court all
 18 the original e-mails which they sent and received in connection with their representation of the
 19 Montgomery Parties during the period January 2006 through and including September 4, 2007, the
 20 date of this Court's Order granting the Flynn motion to withdraw; and (ii) certify to the Court that
 21 they have destroyed all electronic and paper copies of those e-mails. Further, pursuant to the
 22 Order, (i) the original e-mails would be retained by the Court pending resolution of the
 23 *Montgomery v. e-Treppid* litigation, (ii) any third party review of the e-mails would be prohibited;
 24 and (iii) the e-mails would be destroyed upon the conclusion of the action.

25 **“Original” Documents.** The few “original” documents which Flynn believes fall within
 26 the parameters of paragraphs 2 and 3 of the U.S. Protective Order shall be turned over to the Court
 27 for its review and redaction. The original redacted documents shall be returned to the Montgomery
 28 Parties (or to Flynn if the fee issues between the Montgomery Parties and Flynn have not been

1 resolved by Order of this Court). Copies of the unredacted documents shall be retained by the
2 Court pending resolution of the *Montgomery v. e-Treppid* litigation and then destroyed upon the
3 conclusion of the action.

4 These procedures would fully protect the military and state interests identified by the
5 Government and accommodate the concerns of the Montgomery Parties.

6 **VII. CONCLUSION.**

7 For the foregoing reasons, the Government's Motion for Enforcement of U.S. Protective
8 Order with Respect to Attorney Files should be denied in its entirety and that the procedures
9 proposed by the Montgomery Parties in Point VI be adopted by the Court to accommodate the
10 Government's concerns regarding information in the Flynn files that may be protected by the
11 military and state secrets privilege.

12

13 Dated: December 28, 2007

Respectfully submitted,

14
15 LINER YANKELEVITZ
SUNSHINE & REGENSTREIF LLP

16 By: 

17 Deborah A. Klar
18 Tuneen E. Chisolm
19 Attorneys for Plaintiffs
20 DENNIS MONTGOMERY and the
21 MONTGOMERY FAMILY TRUST

22

23

24

25

26

27

28

1
2 **CERTIFICATE OF SERVICE**

3 Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICES OF LINER
4 YANKELEVITZ SUNSHINE & REGENSTREIF LLP, and that on the **28th day of December**
5 **2007**, I caused to be served the within document described as **OPPOSITION OF THE**
6 **MONTGOMERY PARTIES TO MOTION TO THE UNITED STATES TO ENFORCE U.S.**
7 **PROTECTIVE ORDER RE: ATTORNEY'S FILES** on the interested parties in this action as
8 stated below:

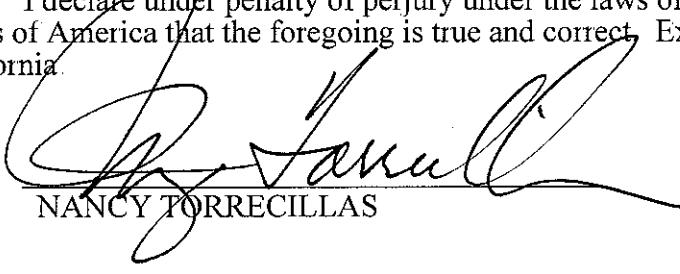
9 J. Stephen Peek, Esq.
10 Jerry M. Snyder, Esq.
Hale Lane Peek Dennison and Howard
11 5441 Kietzke Lane
Second Floor
12 Reno, Nevada 89511
(775) 327-3000; 786-6179 - FAX
13 speek@halelane.com; jsnyder@halelane.com
14 Attorneys for Etreppid and Warren Trepp

15 Reid H. Weingarten, Esq.
16 Brian M. Heberlig, Esq.
Robert A. Ayers, Esq.,
17 Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
18 Washington, D.C. 20036-1795
(202) 429-3000; (202) 429-3902 - FAX
19 rweingarten@steptoe.com;
bhaberlig@steptoe.com; rayers@steptoe.com
20 Attorneys for eTreppid and Warren Trepp

21 Greg Addington, AUSA
U.S. DEPARTMENT OF JUSTICE
22 100 W. Liberty Street, Suite 600
Reno, Nevada 89501
23 E-mail: Greg.addington@usdoj.gov
(775) 784-5181 - FAX
24 Attorneys for Department of Defense

25 **[ELECTRONIC]** By filing the document(s) electronically with the U.S. District Court and
26 therefore the court's computer system has electronically delivered a copy of the foregoing
27 document(s) to the persons listed above at their respective email address.

28 I declare under penalty of perjury under the laws of the State of California and the United
29 States of America that the foregoing is true and correct. Executed on 12/28/2007, at Los Angeles,
California.

30 
31 NANCY TORRECILLAS

32 PROOF OF SERVICE